U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: JUL 0 8 2013

OFFICE: TEXAS SERVICE CENTER

FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner teaches English as a second language (ESL), also called English for speakers of other languages (ESOL), for . On the Form I-140 petition, the petitioner described herself as an elementary teacher, but at the time she filed the petition, the petitioner taught at , Maryland, and Maryland. The petitioner had previously taught at Maryland. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel and copies of standardized test scores.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the

Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990, published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

In re New York State Dept. of Transportation (*NYSDOT*), 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner must establish that the alien will serve the national interest to a substantially greater degree than would an available United States worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The intention behind the term "prospective" is to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The USCIS regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the Form I-140 petition on April 12, 2012. In an introductory statement, counsel stated that the petitioner's "petition for the waiver of the labor certification is premised on her Master's Degree in Education and more than ten (10) years of dedicated and progressive teaching experience." Under the regulations at 8 C.F.R. §§ 204.5(k)(3)(ii)(A) and (B), a degree plus ten years of experience could partially support a claim of exceptional ability in the sciences, the arts, or business, but additional evidence would still be necessary. As stated above, exceptional ability is not grounds for the waiver; aliens of exceptional ability are, by law, subject to the job offer requirement.

Therefore, the petitioner's degree and experience cannot provide *prima facie* support for the national interest waiver application.

Counsel discussed the overall importance of ESL education and asserted that the petitioner's "consistent high performance, dedication to her students, and leadership among her colleagues exemplifies the very qualities of an educator that the United States educational system strives to provide for America's future generations."

In an accompanying personal statement, the petitioner described her past experience and her current work. Neither the petitioner nor counsel addressed the guidelines set forth in *NYSDOT* for the national interest waiver. The petitioner, in her statement, did not mention the waiver at all.

The petitioner submitted letters from several administrators and teachers who have worked with her, as well as from former students and their parents. The witnesses praised the petitioner's abilities and dedication, but did not indicate that the petitioner has or will benefit the United States to a greater extent than other qualified ESL teachers.

A section of the record labeled "Awards and Certificates" includes numerous exhibits, most of which document the petitioner's fulfillment of continuing education requirements or show her completion of specialty courses. The certificates do not show recognition outside of

The director issued a request for evidence on July 13, 2012, stating: "The petitioner must establish that the beneficiary has a past record of specific prior achievement with some degree of influence on the field as a whole. The beneficiary's previous influence on the field as a whole must justify projections of future benefit to the national interest."

In response, counsel stated:

> Since a 'National ESOL Teacher' is not even a real concept but more of metaphysical cognition [*sic*], undersigned wishes to once again posit a realistic proposition upon which to establish that the self-petitioner's contributions will impart national-level benefits.
>
> Even the curricula used by each state education department in the United States vary from each other.
>
> In other words, since not all NIW cases are based on prevailing Acts of United States Congress made with premise on some prevailing Acts of United States Congress, it is but harmless to assert that if an NIW Petition is made with premise on some prevailing Acts of United States Congress, that by itself renders the proposed employment national in scope. But in those cases that are not premised on any prevailing Act of United States Congress, NIW self-petitioners must meet the issue on other bases.

All employment-based immigrant classifications are based on "prevailing Acts of United States Congress," and so is the statutory job offer requirement. There is no basis to conclude that Congress, by mentioning a given occupation in a particular piece of legislation, exempted aliens in that occupation from the job offer requirement.

Following the issuance of *NYSDOT* in 1998, Congress has enacted only one statutory change in direct response to that precedent decision. Specifically, Congress added section 203(b)(2)(B)(ii) to the Act, creating special waiver provisions for certain physicians. Those provisions do not apply in this proceeding. Therefore, *NYSDOT* controls in this case. Counsel did not show that other statutory provisions indirectly imply the petitioner's eligibility for the waiver, even though those provisions never mention the waiver directly.

Counsel cited various statutes and policy initiatives regarding the value of education in general and ESL education in particular. These provisions do not create a blanket waiver for ESL teachers.

Counsel asserted: "The best way to make today's students is to be educated by 'Highly Qualified Teachers' like [the petitioner]." The phrase "Highly Qualified Teacher" appears capitalized and in quotation marks because that phrase appears repeatedly in the No Child Left Behind Act (NCLBA). Counsel states that the labor certification process could not take the petitioner's master's degree into account, because the minimum academic qualification for a school teacher is a bachelor's degree. Therefore, counsel claimed, the labor certification process "would not meet the objective of the employer to hire highly qualified teachers pursuant to No Child Left Behind (NCLB) Law."

Section 9101(23) of the NCLBA, 20 U.S.C. § 7801(23), defines the term "highly qualified" in reference to teachers. Sections 9101(23)(B) and (C) of the NCLBA require that a "highly qualified" teacher "holds at least a bachelor's degree." Section 9101(23)(B) of the NCLBA also refers to "highly qualified" teachers who are "new to the profession." Thus, neither the petitioner's master's degree nor her years of experience – the two factors that counsel had originally cited in support of the petition - are required for "highly qualified" status under the NCLBA. Because the NCLBA defines a teacher with a bachelor's degree as "highly qualified" (provided the teacher meets other specified requirements), the labor certification process does not thwart the NCLBA by setting the minimum degree requirement at a bachelor's degree rather than a master's degree.

Counsel contended that the petitioner has unique or special traits that labor certification cannot take into account, but the petitioner failed to submit evidence to support this claim. The unsupported assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

In her second personal statement, the petitioner discussed the state of ESOL education in the United States, and its importance within the overall educational infrastructure. These assertions address the intrinsic merit of ESL education, which is only one prong of the three-pronged *NYSDOT* national interest test. The petitioner also asserted: "ESL positions in U.S. schools are considered hard-to-staff positions. . . . Few U.S. teachers are highly qualified and fully certified to teach the ESL

students. . . . [T]he U.S. schools throughout the country are in need of many more certified and qualified ESL teachers." With regard to the unavailability of qualified U.S. workers, the job offer waiver based on national interest is not warranted solely for the purpose of ameliorating a local labor shortage, because the labor certification process is already in place to address such shortages. *NYSDOT*, 22 I&N Dec. 218. The assertion of a labor shortage, therefore, should be tested through the labor certification process. *Id.* at 220.

The director denied the petition on November 7, 2012, stating that, whatever the overall merit of ESL education at a national level, "the impact of a single Elementary School teacher in Maryland is not in the national interest for purposes of waiving the job offer requirement of section 203(b)(2)(B) of the Act. The petitioner has not established that the impact of her activities will be national in scope."

On appeal, counsel notes that Congress passed the NCLBA three years after the issuance of NYSDOT as a precedent decision, and claims that "the NCLB Act and the Obama Education Programs, taken collectively, provide the underlying context for the adjudication of a national interest waiver application made in conjunction with an E21 visa petition for employment as a Highly Qualified Teacher in the public middle school education sector." Counsel, however, identifies no special legislative or regulatory provisions that exempt school teachers from *NYSDOT* or reduce its impact on them.

Counsel's assertion that the NCLBA modified or superseded *NYSDOT* is not persuasive; that legislation did not amend section 203(b)(2) of the Act. In contrast, section 5 of the Nursing Relief for Disadvantaged Areas Act of 1999, Pub.L. 106-95 (November 12, 1999), specifically amended the Immigration and Nationality Act by adding section 203(b)(2)(B)(ii) to that Act, to create special waiver provisions for certain physicians. Because Congress not only can amend the Act to clarify the waiver provisions, but has in fact done so in direct response to *NYSDOT*, counsel has not established that the NCLBA indirectly implies a similar legislative change.

Counsel states:

> With respect to the E21 visa classification, INA § 203(b)(2)(A) provides in relevant part that: "Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the **national . . . educational interests**, . . . of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States."

Counsel, above, highlighted the phrase "national educational interests," but the very same quoted passage also includes the job offer requirement, *i.e.*, the requirement that the alien's "services . . . are sought by an employer in the United States." Counsel has, thus, directly quoted the section of relevant law that supports the director's conclusion. By the plain wording of the statute that counsel quotes on appeal, an alien professional holding an advanced degree is presumptively subject to the

job offer requirement, even if that individual "will substantially benefit prospectively the national . . . educational interests . . . of the United States." Neither the Immigration and Nationality Act nor the No Child Left Behind Act, separately or in combination, create or imply any blanket waiver for teachers. On appeal, counsel maintains "it has been demonstrated that . . . the bench mark of [the petitioner's] request for waiver [is] compliance with the No Child Left Behind Act of 2001." The petitioner has failed to establish this claim.

Counsel contends that the "USCIS erred in disregarding evidence demonstrating the national scope of petitioner's proposed benefit through her effective role in serving the national educational interest of closing the achievement gap." The record, however, contains no evidence that the petitioner's efforts have significantly closed that gap. Citing printouts submitted on appeal, counsel states: "The 2012 MSA [Maryland State Assessment] Reading results show that out of the 24 Maryland school districts ranked near the bottom at the 'All Student' level for each MSA-covered grade level." Counsel adds: "it is noteworthy that the updated 2012 Maryland Report Card shows that did not meet its Reading proficiency AMO targets." The petitioner had worked for since 2008, and thus had been there for a number of years before the administration of the 2012 MSA tests. Counsel does not explain how the documented 2012 results (which show particularly low numbers for non-English proficient students) establish that the petitioner has played an "effective role . . . closing the achievement gap."

Counsel refers to the petitioner as "a teacher of Special Education," and as "an effective teacher in raising student achievement in STEM" (science, technology, engineering and mathematics), but the petitioner has not submitted evidence to establish that she teaches in those specialties.

Counsel states that a waiver would ultimately serve the interests of United States teachers, because if schools "fail to meet the high standard required under the No Child Left Behind (NCLB) Law," the result would be "not only . . . closure of these schools but [also] loss of work for those working in those schools." Counsel does not document "closure of . . . schools" for failing to meet NCLBA requirements, and the record does not show that the petitioner's work has brought schools closer to meeting the NCLBA requirements.

As is clear from a plain reading of the statute, engaging in a profession (such as teaching) does not presumptively exempt such professionals from the requirement of a job offer based on national interest. Congress has not established any blanket waiver for teachers. Eligibility for the waiver rests not on the basis of the overall importance of a given profession, but rather on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.